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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1440

EDWARD W. MAHER, Commissioner of Social Services of the State of Connecticut,

Appellant,

vs.

SUSAN ROE, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Connecticut

AMICUS CURIAE BRIEF OF THE STATE OF NEW JERSEY

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Interest of the *Amicus*

The State of New Jersey is filing a separate *amicus curiae* brief in this matter because of its extreme importance to the State, in terms of the ability of its Legisla-

ture to fashion, within reasonable fiscal limits, such public welfare assistance programs for medical services as it deems most responsive to the competing public needs. The decision of the United States District Court for the District of Connecticut, as well as other similar decisions, which have read far-reaching requirements with respect to allocation of public welfare assistance programs into the Equal Protection Clause of the Fourteenth Amendment, promises to substantially undermine the necessary flexibility a state must have to fashion such assistance programs attuned to the immediate local climate.

The nature of the welfare assistance program in New Jersey in general and for medical services in particular, is extensive and varied. Because, however, the fiscal resources of the State are limited, it does not provide for every service which might be desired. Rather it reflects difficult choices made by the duly elected representatives of the people in terms of evaluating and balancing the complex and competing needs of the poor. The choices made by the State's Legislature concerning reimbursement for medical services are not only difficult because they must, of necessity, be selective, but they become even more difficult because of the delicate and controversial nature of the public welfare assistance program in general and the Medicaid program in particular. While the state must provide for the competing needs of its poor, it must do so with the confidence and acceptance of all of its people since the very well being of any democratic government depends totally upon the acceptance by and support of the people for whom it serves. This support and acceptance becomes particularly crucial when the state endeavors to provide for such controversial services as reimbursement for abortions. It is precisely this dilemma

faced by any state's elected officials, in attempting to fashion responsive and remedial welfare assistance programs, that has moved this Court so many times to reaffirm and uphold the broad flexibility of the states to allocate their resources for social programs.

In an attempt to provide a sound and publicly accepted welfare assistance program for medical services. the state, for the large part, has attempted to satisfy the most urgent and necessary needs of the poor. Thus, in terms of medical assistance, the State has, for the present, chosen to provide for those services which are medically necessary. In an attempt to extend such assistance for abortions, which so often has generated emotional reactions amongst the public, the State has followed this present policy and authorized, by Laws of 1975, Chapter 261 (N.J.S.A. 30:4D-6.1), assistance for the termination of a woman's pregnancy where "it is medically indicated to be necessary to preserve the woman's life." Even this limited approval of public assistance, however, has met substantial and widespread social and political resistance.

Indeed, a suit is presently pending in the Federal District Court for the District of New Jersey challenging the validity of that law on the same constitutional and statutory ground raised below in this case. *Doe* v. *Klein,* Docket No. 76-74, United States District Court, District for New Jersey. As a result of the recent decisions concerning this issue, New Jersey's law has been preliminarily enjoined by the Federal District Court in *Doe* v. *Klein.* Any decision by this Court in the present case will substantially, if not conclusively, impact on the outcome of *Doe* v. *Klein* and the validity of Laws of 1975, Chapter 261.

Thus, an affirmance of the district court's judgment would result in the imposition upon New Jersey by judicial decree of a highly controversial welfare assistance program for medical services which the State Legislature has determined, after considering the competing local concerns and needs, is not at the present time an appropriate allocation of available revenue resources. It is clear, therefore, that the State of New Jersey has a vital interest in preserving the authority of its Legislature to fashion provisions for such controversial public welfare assistance which are consistent with its views of proper allocation of State resources amongst the competing interests of the poor.

ARGUMENT

The State's interest in fashoning a reasonable, responsive and publicly acceptable public welfare assistance program for medical services constitutes a rational basis for providing assistance only for those medical services, including abortions, which are medically indicated.

The ultimate constitutional issue involved in this case is whether the equal protection of the law under the Fourteenth Amendment inflexibly mandates a state government to allocate available public resources for abortions which are not medically necessary, when that government has elected to allocate its resources to provide coverage for medically necessary expenses of birth including medically necessary abortions. Although this issue has been characterized by other courts as concerning a woman's "fundamental" right to have an abortion during the first two trimesters of pregnancy, thus requiring the application of

the state compelling interest test in determining the validity of the classification involved, the application of this standard is based upon a misconception of the nature of the state statutes and policies involved. What is involved in this case is not a violation of a woman's right to choose to have an abortion, but simply a policy determination by the duly elected representatives of a state concerning the appropriate allocation of public funds for medical assistance to the poor.* This Court has not held that a state is under a duty to finance the exercise of a pregnant woman's choice to have an elective abortion, neither has it ever held that medical care in general is a fundamental right; and it has declined to characterize welfare as a fundamental right. *E.g., Jefferson* v. *Hackney,* 406 U.S. 535 (1972).

In this respect, a party who challenges the validity of social legislation under the Equal Protection Clause of the Fourteenth Amendment generally bears the heavy burden of demonstrating that the Legislature has acted in

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* The assumption that the state policies involved herein violate a woman's constitutional right to choose to have an abortion is based in part upon the factually unsupported contention that without public reimbursement indigent women will be unable to obtain an abortion. As noted by Judge Weis in his dissenting opinion in *Doe* v. *Wohlgemuth,* 376 F.Supp. 172, 193 (D. N.J. 1975), rev'd *sub nom, Doe* v. *Beal,* 523 F.2d 611 (3rd Cir. 1975), *cert.* granted, 44 L.W. 3761 (1976), "it is only money from the state which is at issue and the absence of state funds, on this record, will not absolutely prevent the plaintiffs from obtaining the services which they desire." The cost of an abortion in the first trimester which need not be performed in a hospital is not substantial and, as Judge Weis noted, "it may be assumed that various nonprofit organizations' interest in advancing their point of view of the desirability of abortions on demand realistically could be expected to give financial assistance if approached." *Id.* n. 5.

an invidiously discriminatory or palpably unreasonable manner. *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955). It has consistently been held that while the Equal Protection Clause prohibits invidious discrimination, state statutory classifications will be set aside only if no grounds can be conceived to justify them. Particularly with respect to welfare programs, so long as the classification created is rationally supportable, this Court will not interpose its judgment for that of the state Legislatures. *Dandridge* v. *Williams,* 397 U.S. 471 (1970). Mr. Justice Rhenquist aptly observed for the Court in *Jefferson* v. *Hackney, supra,* 406 U.S. at 551:

> "'We do not decide today that the [state law] is wise, that it best fulfills the relevant social and economic objectives that [the state] might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. . . . [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.'"

Thus, in *Dandridge, supra,* the Court rejected a claim that a Maryland welfare regulation, establishing a maximum grant for any AFDC family, denied equal protection to children in large families. Although the maximum grant limitation obviously discriminated against such children, the Court found that fiscal consideration as well as the maintenance of income differentials between welfare recipients and the working poor provided a ratonal justification for the discrimination. In *Jefferson* v. *Hackney, supra,* the Court sustained the validity of a welfare program under which the aged and disabled received higher benefits than dependent children, even though there was a substantially larger percentage of blacks and Mexicans in the dependent children program and despite the weakness of the proof that children have lesser needs than the aging and disabled.

Perhaps most pertinent to this case is the Court's recent decision in *Gedulig* v. *Aiello,* 417 U.S. 484 (1974). Reaffirming the wide discretion accorded states in the fashioning of appropriate welfare programs, this Court rejected a challenge on equal protection grounds to the provisions of the California employment disability legislation which excluded coverage for pregnancy related disability. Recognizing the legitimate concerns of the states in attempting to provide sound programs with limited resources for as many people as possible, the Court upheld the exclusion despite the fact that the California program provided coverage for the full range of other medical disabilities.

The distinction made in the present case between medically necessary expenses of pregnancies, including therapeutic abortions, and nonmedically necessary expenses of pregnancies, including elective abortions, is no less a valid exercise of the states' powers to fashion appropriate welfare programs. It represents a considered evaluation of various conflicting and competing interests and needs within the broad scheme of the entire structure of welfare programs and the limited resources for such programs. It does no more than strike a reasonable balance between totally excluding assistance for all medical services attendant with pregnancies and providing for all

medical services attendant with pregnancies, including elective abortions, a program which would clearly be fiscally, socially and politically unacceptable. The choice made to allocate public resources for only those medical services which are medically required, including therapeutic abortions only, surely has some basis in reason and therefore is a proper exercise of legislative power. As Judge Weis said in his dissent in *Doe* v. *Wohlgemuth,* 376 F.Supp. 173, 194 (W.D. Pa. 1974), rev'd *sub nom., Doe* v. *Beal,* 523 F.2d 611 (3rd Cir. 1975), *cert.* granted 44 L.W. 3761 (1976):

> ". . . While a financial basis for such a broad policy is obvious, another consideration may be the additional strain on limited medical facilities and resources. Nor can we ignore the difficult legislative judgment as to where to draw the line so that the medical services furnished without charge to the indigent are not so grossly disproportionate to those which may be available to those who, while not indigent, have little money to pay for necessary care, let alone electives, after paying for the absolute necessities of life."

As set forth in the interest of the *amicus* portion of this brief, the Legislature of the State of New Jersey, duly elected by the people of this State, has determined to allocate available public funds amongst the competing interests of the poor to provide assistance for necessary medical services, including therapeutic abortions, prenatal and other medically necessary childbirth care. Such determination involves areas of controversy primarily entrusted to State government. It is certainly not the function of courts to choose between competing claims for public revenues or conflicting social and political theories. Even assuming that the present system of allocating public funds for certain welfare medical assistance programs in many states might not be the most palatable it should be remembered that ". . . the Constitution does not provide judicial remedies for every social and economic ill." *Lindsey* v. *Normet,* 405 U.S. 56 (1972).

CONCLUSION

The District Court failed to give consideration to the equal protection principles governing this case set forth expressly in *Gedulig* v. *Aiello,* 417 U.S. 484 (1974); *Jefferson* v. *Hackney,* 406 U.S. 535 (1972); and *Dandridge* v. *Williams,* 397 U.S. 471 (1970). It is respectfully submitted that the application of those priniciples to this case clearly demonstrates that the decision below is erroneous and should be reversed.

Respectfully submitted,

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